

FILED

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

December 02, 2024
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

BY: Christian Rodriguez
DEPUTY

**MONICA ABBOUD, on behalf of
herself and all those similarly situated,
Plaintiffs,**

v.

**LOTTA DOUG, LLC, d/b/a
HOBOKEN PIE,
Defendant.**

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Civil Action No. 1:24-cv-00482-JRN

DEFENDANT'S SUPPLEMENTAL MOTION TO DISMISS

Defendant, Lotta Dough, LLC d/b/a Hoboken Pie ("*Defendant*" or "*Hoboken Pie*") files this supplemental motion to dismiss the class action complaint filed by Plaintiff, Monica Abboud ("*Plaintiff*") pursuant to Federal Rule of Civil Procedure 12(b)(6).

A. Incorporation by Reference.

1. Defendant incorporates herein by reference its Motion to Dismiss filed on July 3, 2024 (DKT 7).

B. The TCPA—unlike the Equal Employment Opportunities Act, for example—does not define "person" to include "any *agent* of such a person" so as to invoke vicarious liability.

2. Plaintiff argues that Defendant is vicariously liable for an "anonymous telemarketing company['s]" alleged Telephone Consumer Protection Act ("*TCPA*") violations. *See* Complaint at ¶ 18 (alleging "[o]n information and belief, Defendant uses an anonymous telemarketing company to make phone calls on its behalf soliciting customers

for its restaurant business"); *see In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 565 (2008) (the "2008 FCC Order").

3. Plaintiff's argument is premised not on the plain language of the TCPA nor an interpretation of the TCPA by a United States District Court, Circuit Court of Appeals, or the Supreme Court of the United States, but instead on an interpretation of the TCPA by the Federal Communications Commission ("*FCC*") under the aegis of *Chevron* deference.

4. On June 28, 2024, the Supreme Court of the United States, declared *Chevron* deference dead. *See Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244, 2024 WL 3208360 at *22 (2024) (overruling *Chevron* and stating, "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires...[and] need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous").

5. "Person" is not defined in 47 U.S.C. § 277. "Person" is defined in purposes of the Chapter as "an individual, partnership, association, joint-stock company, trust, or corporation." 47 U.S.C. § 153(39).

6. The plain language of the TCPA states that "[i]t shall be unlawful for any *person* within the United States...to make any call...to initiate any telephone call...to use any telephon[ic] [device]...to use an automatic telephone dialing system" or "make[] more than one telephone call within any 12-month period by or on behalf of the same entity¹[".] TCPA at §§ 227(b)(1)(A)-(G) (emphasis added) and § 227(b)(5).

¹ The phrase "by or on behalf of the same entity" refers to the entity that made the initial telephone call under § 227(b)(5); to conclude otherwise renders the phrase superfluous at best and ambiguous at worst. "[C]ourts

7. Compare the relevant definitions under the Equal Employment Opportunities Act ("EEOA") as but one of several examples in the United States Code where Congress intended to impose *vicarious liability*: "employer" means..."any *agent* of such a person", "employment agency" means "any person...and includes an *agent* of such person", and "labor organization" which means "any *agent* of such an organization[.]" 42 U.S.C. § 2000e(b)-(d) (emphasis of "agent" added).

8. Plaintiff's reliance on *Chevron* to impose vicarious liability *viz-a-viz* an interpretation of the TCPA by the 2008 FCC Order is not binding on this Court. To be sure, in *Loper Bright*, the Supreme Court admonished that "[t]he interpretation of the meaning of a statute, as applied to justiciable controversies" [is] "exclusively a judicial function." *Loper Bright*, 144 S.Ct. 2244, 2024 WL 3208360 at *9 (internal quotations omitted). Section 707 of the Administrative Procedures Act ("APA") "makes clear that agency interpretations of statutes—like agency interpretations of the Constitution—are *not* entitled to deference." *Id.*

9. Defendant's liability, according to the facts alleged in Plaintiff's Complaint, rests entirely on the principle of vicarious liability *read into* the TCPA by the FCC. The plain language of the TCPA prohibits this as does deploying *Chevron* deference to impose vicarious liability. This Court must interpret the TCPA—with respect to Plaintiff's vicarious liability theory—by applying traditional rules of statutory interpretation. Doing so here compels only 1 result: dismissal of Plaintiff's TCPA causes of action against Defendant.

need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous." *Loper Bright*, 144 S.Ct. 2244, 2024 WL 3208360 at *22.

Congress is presumed to have acted intentionally and purposefully when it included vicarious liability in the EEOA and omitted it in the TCPA.

10. **FOR THESE REASONS**—in addition to those set forth in Defendant's Motion to Dismiss—Defendant prays the Court dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the above and foregoing instrument to be served on the following counsel of record on July 15, 2024:

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